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A-E's Fee Was Set

Contract precluded extra pay for redesign work

An architect-engineer's contract may be so drawn as to preclude extra payment for redesign work, a federal contract appeals board has ruled.*

In this case, the architect-engineer had contracted to design a Coast Guard air station and to perform other services for a lump-sum, fixed fee. Architectural designs were to be performed in three stages; preliminary, intermediate and final.

When the A-E submitted its preliminary design, it also submitted its cost estimate. The total cost estimate greatly exceeded the available budget. Every item on the estimate was substantially more than the amount that the Coast Guard had estimated. As a result, various alterations were made in the design criteria, and the construction budget was increased.

The A-E then submitted its intermediate design incorporating the alterations in design. The new engineering cost estimate was just under the revised construction ceiling. The Coast Guard made various comments which were to be included in the final submittal. On the final submittal the total cost estimate was again above the allotted amount. In addition, certain design and drawing discrepancies were noted by the Coast Guard. The final submittal was rejected. On correction and resubmission they were approved.

After construction bids were opened, and apparently after the contract was awarded at a figure substantially higher than estimated, the A-E filed a claim for the additional design work. It claimed that it was entitled to an increase in its fee proportionate to the amount that the construction bid exceeded the estimated cost. It argued that the original budget figure in its contract was unrealistic and that "there is a definite correlation between the construction value of a project and design costs . . ."

The contracting officer denied the claim and the A-E appealed to the Department of Transportation Contract Appeals Board.

On appeal the A-E alleged that the Coast Guard's original budget estimate was so low as to constitute a defective specification. The board noted that the A-E had originally been furnished with an itemized breakdown of the estimated costs in the early stages of precontract negotiations. Although the total cost and breakdown estimates submitted by the A-E with its preliminary design exceeded the corresponding government estimates,

estimated budget was wrong, the board said.

"We can find nothing in the record which clearly establishes that the Coast Guard's estimate was so deficient or made so carelessly, or with such gross error, that it must be deemed to be part of a defective specification of the government's requirements," the board said. "In the absence of specific evidence of error or miscalculation, we cannot say that the differences between the Coast Guard's estimate and the architect's estimate or estimates prove substantial defects in the Coast Guard's estimate."

The next point of consideration was the AE's allegation that its fee for designing the project should be computed as a percentage of the construction bid price. The board considered the fact that in an architectural service contract the A-E has a wide latitude in saying what the design will be, what materials and construction methods will be employed, and many other factors all of which have a direct and ultimate impact on the construction cost. In ruling that the fixed contract fee represents full compensation in the absence of compensable charges under the terms of the contract, the board held that "to fix the architect's fee as a percentage of the amount bid to construct the design would build into the architect's contract an incentive to overdesign the project and, hence, inflate the fee."

With regard to compensable changes under the contract, the board referred to the contract clause which provided that "the contractor will redesign as necessary at no additional cost to the government until a satisfactory low bid for construction has been obtained that is within the amount available and reserved for construction."

Within these guidelines, the board held that all redesign work performed by the A-E during its three design phases in order to bring the estimated construction cost within the amount available was not recoverable as a compensable change. The A-E would be permitted, it said, to recover only for doing that additional design work where the government demands changes to a submittal after it has been approved, or where basic project requirements are so altered as to affect prior design work. Additional design work, the board noted, must always be differentiated from the required redesign work specified in the contract.

The appeal was remanded back to the contracting officer for negotiation on certain specific items for which the board considered the A-E entitled to payment under the contract.

*Appeal of Praeger-Kavanagh-Waterbury, DOT CAB No. 67-13, 69-1 BCA

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Contractor May Collect For an Owner's Delay

The Armed Services Board of Contract Appeals has ruled that a government contractor was entitled to reimbursement for the increased costs he incurred when he was forced to suspend work because of the government's delay in issuing required change orders.*

The contractor, for a fixed price, had agreed to perform marine construction work involving the repair of barge piers and ferry landings at two locations in Texas. At a preconstruction conference the government informed the contractor that either the barge or ferry facilities must be operable at all times. In compliance with the request, the contractor prepared a progress schedule outlining its anticipated work phases which would continuously allow the use of one facility. The progress schedule was approved. The contractor then ordered its material so that it would be delivered to the sites to coincide with its scheduled work.

After starting work, the contractor encountered several defective conditions at the site. These conditions were immediately called to the attention of the government inspector. In addition, letters were sent to the contracting officer requesting contract changes and also indicating that the entire work schedule was being disrupted. Further, the contractor stated that if the changes were not promptly issued, then it would be forced to work in winter months which would cause even longer delays.

Although a government engineer visited the site and noted that deficiencies existed, no commitment was made to issue changes because there was a question of whether sufficient funds were available. Subsequently, the contractor was informed that the proposed changes were being held up until funds were made available.

About one month later, the contractor was unilaterally directed to perform the corrective work. The contractor agreed to the price for the corrective work, but specifically stated that the change did not include its claim for suspension costs caused by the government's delay in issuing the changes.

The contractor appealed from an adverse decision by the contracting officer to the Armed Services Board of Contract Appeals. The board first disposed of the government's argument that the contractor should have discovered the defective conditions on its site investigation. The conditions were not of such nature as would normally be discovered by a bidder and the contractor could not be charged with any knowledge of their existence, it said.

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The board also found that the contractor had originally scheduled its work and progress so that it would first be able to do that portion of work where the materials and supplies were readily available and that work requiring special material would be done later. The contractor had planned its work and progress so as to coordinate it with the delivery capabilities of its suppliers.

When these facts were reviewed, in conjunction with the requirement that one system of water transportation be kept operable at all times, the board concluded that after the contractor started on either the barge or ferry work and ran into a defective condition, it was unable to stop work on one area and start work on another.

The board held that the contractor was entitled to an equitable adjustment because its work was suspended "when action was deferred on required proposed changes because of lack of funds."

**Appeal of A. F. Drexler, d/b/a Drexler Construction Co., ASBCA Nos. 12249 and 12316, 69-1 BCA 7572 (1969)*

Owner Warrants Adequacy Of Plans Contractor Uses

A contractor was entitled to damages for delays resulting from the government's breach of an implied warranty to furnish a set of drawings that were adequate for construction, the U.S. Court of Claims has ruled.* The contractor, in reviewing the drawings during the bidding stage, was not required to analyze them to see if they were adequate, and had a right to assume their adequacy, the court said.

The ruling was made in a suit filed against the United States by a general contractor to recover damages suffered by itself and its subcontractors during construction of an extension to the Department of State Building in Washington, D.C. The contractor based its action on a breach of warranty, claiming the government had furnished illegible and inadequate plans and drawings.

The General Services Administration Board of Contract Appeals denied the contractor's claim on the ground that it lacked any jurisdiction to hear the appeal. The case then went to the U.S. Court of Claims.

Although plans furnished by the government need not be "perfect," they must be adequate for the intended purpose, the court said. In addition, when the government furnishes the contractor with detailed plans and specifications, there is an implied warranty that construction in accordance with the drawings and specifications will result in the satisfactory completion of the building, it said.

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The court found that the government had failed to prepare the drawings with ordinary care and had issued them prior to performing necessary checking. In fact, the drawings "were not sufficiently legible or coordinated to permit satisfactory construction," the court said. Subsequently, the government, on its own determination, issued new drawings to eliminate the deficiencies.

In response to the government's argument that the drawing deficiencies were so obvious that the contractor should have recognized them and anticipated the delay, the court held:

"The true condition of the drawings was unknown to the plaintiff (contractor) at the time it bid the project. Seemingly, even the defendant (government) was unaware of the full extent of the inadequacies and lack of coordination in the drawings, particularly after the addenda were issued. There was no reason for the plaintiff to suspect that legible drawings could not be easily secured to replace those which were unreadable, or that the addenda drawings did not correct most, if not all, of the coordination errors apparent in the original drawings. Further, plaintiff was under no contractual or legal obligation to inspect the drawings to determine their adequacy for construction prior to the contract award. Rather, its study of the contract documents was merely for purposes of estimating its bid, and it has not been shown that plaintiff knew or should have known how defective the drawings actually were. Therefore, plaintiff's pre-bid examination of the drawings did not render the implied warranty inoperative through waiver or estoppel, and plaintiff may invoke such warranty as a basis for recovery."

The court concluded that the government had breached its warranty, entitling the contractor and its subcontractors to reasonable compensation for the period of delay.

**John McShain, Inc. v. United States, United States Court of Claims, No. 173-63 (July 16, 1969).*

Responsibility for Work Not Detailed in Drawings

The government has held a contractor responsible for doing certain electrical hookups even though the contract drawings did not detail the connections.*

The case involved a Coast Guard contract for construction of two barracks complete with all connections to the exterior utility services. After the work was started, the contractor requested the contracting officer to propose various changes because there was no contract drawing or provision requiring electrical hookup

and connection of various items.

A change was issued for the work without a price, which was to be settled on future negotiations. However, the contracting officer subsequently determined that the work was part of the original contract and refused to allow any additional compensation. The contractor performed the work under protest and then sought payment for the work.

The sole issue before the Department of Transportation Contract Appeals Board was whether the contractor was required, by contract, to do the electrical connections despite the lack of electrical hookup details in the drawings. In order to arrive at a decision, the Board held that it was required to read all parts of the contract to establish its meaning and effect.

The specifications, the board noted, generally provided and anticipated that the contractor was responsible for a complete job, which included a fully operable electrical system. In light of the specifications, the board then considered whether the contractor's interpretation, based solely on the lack of detailed drawings, was reasonable. It held:

"It is true that the electrical hookup details . . . were omitted from the contract. However, the omission of some details does not relieve the contractor from the responsibility of performing a complete job otherwise required in the contract. The decisive test is whether the omission created such an ambiguity in the contract that the interpretation adopted and relied upon by the contractor was reasonable under the circumstances."

A reasonable interpretation of the contract as a whole obviously includes the necessary connections for the proper functioning of the equipment, the board said. It is not mandatory that every requirement be detailed in the drawings so long as "the contractor is given sufficiently clear notice of his requirements and obligations in the specifications," it explained.

In this case, even without detailed drawings, the contractor's contractual obligations were clear, the board said. The contractor's interpretation was found to be both strained and unreasonable, and its claim for additional compensation was denied.

**Appeal of Northeast Construction Company of West Virginia, DOT CAB Nos. 68-33 and 68-33A, 69-1 BCA 7556 (1969)*

Recent decisions are selected and reviewed by Michael S. Simon, member of the New York Bar.